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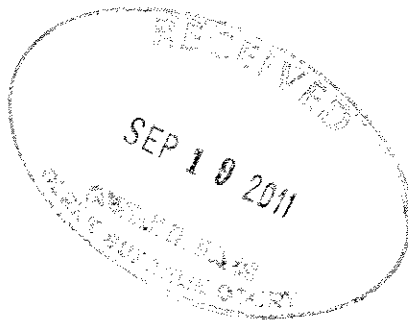


Corbin R. Davis, Esq.
Clerk, Michigan Supreme Court
P O Box 30052
Lansing MI 48909

re: ADM File #2010-13

Dear Mr. Davis:

Timothy Baughman's September 13, 2011, letter regarding the above-numbered file asserts that "MCR 6.201 does not apply *currently* either to preliminary examinations or to misdemeanors" and that, therefore, "[t]he proposed rule *changes* nothing, serving only as a point of emphasis or clarification" (emphasis in original). These assertions are incorrect and warrant a response.

If the proposed amendment would change nothing, there is no reason for this Court to expend its time and resources considering it. One may also reasonably assume that the proponents of the amendment intend it to change current procedure. The proposed rule, if adopted, would dramatically change well-established procedure and, in the course of doing so, it would significantly undermine the value of the preliminary examination process as an effective screening mechanism, its fundamental historical purpose.

Regardless of whether the right to discovery prior to preliminary examination is considered to be rooted in the court rules or case law, it is and has long been widely recognized and frequently relied upon in the state. It was recognized in Bay County Prosecutor v Bay County District Judge, 109 Mich App 476 (1981), a decision which is as viable today as it was when issued. The viability of Bay County Prosecutor is, in fact, recognized in Michigan Criminal Law & Procedure (2nd ed), of which Mr. Baughman, Joan Ellerbusch Morgan and I are co-authors. *Cf.* §20:41 (Practice tip – Discovery – Defense view, encouraging "a full, formal request [for discovery] before preliminary examination" on the authority, *inter alia*, of Bay County Prosecutor); §20:483 (form motion to dismiss for failure to provide court-ordered discovery for use in either circuit court or district court, citing, among other cases, Bay County Prosecutor).

It is also incorrect that the court rules do not currently provide for discovery at the preliminary examination stage. The argument that the rules do not provide for discovery in felony cases at the preliminary examination stage relies on a construction of MCR 6.001(A) that confuses "cognizable" with "pending in". A felony charge is "cognizable" in circuit court because it is capable of being tried in that court if specific conditions are met. *Cf.* Black's Law Dictionary (6th

ed) at p 259 (a matter is "cognizable" if it is "[c]apable of being tried or examined before a designated tribunal"). Indeed, among the rules referred to in Rule 6.001(A), a number of them explicitly apply to felony cases while those cases are in district court, which would not be the case if "cognizable" meant "pending in". *Cf.*, *e.g.*, MCR 6.004 (speedy trial), 6.005 (right to assistance of counsel), 6.006 (video and audio proceedings), 6.104 (arraignment on the complaint and warrant), 6.106 (pretrial release), 6.110 (preliminary examinations).

A key purpose of the court rules is, of course, "to secure the just, speedy, and economical determination of every action". MCR 1.105. For the reasons detailed in Kary Moss' and my initial letter, the proposed amendment would ultimately be bad policy because it would run contrary to this guiding principle by undermining the fairness and efficiency of the preliminary examination process.

For all of these reasons, I respectfully encourage the Court to reject the proposed amendment.

Thank you in advance for your consideration of these comments.

Sincerely,

Kenneth M. Mogill

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